No. 2371

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States for the District of Oregon

Appellant's Reply Brief

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6382-THE ARCADY PRESS, PORTLAND

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CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKINBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation. EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKINBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY BRIEF.

The crucial question in this case is:

Had Hall's agency for the sale and conveyance of the land in question terminated at the time he became interested in the purchase thereof with Sengstacken, Smith, Rogers, Rood and Clinkinbeard?

If his agency had terminated at that time, the sale to the syndicate was valid. If not, it was invalid.

Appellees were bound to concede that Hall entered into an understanding with Sengstacken, whereby it was agreed that Hall was to have a share in the purchasing syndicate and a joint undivided interest in the land, before he executed and delivered the deed thereof, under his power of attorney, to the Title Guarantee & Abstract Company, trustee, on August 31, 1905. Sengstacken himself reluctantly admitted that fact to be true on his cross-examination before the trial court. (T., p. 332.)

Appellees contend, however, that Hall's agency terminated before he conveyed the property to the Title Guarantee & Abstract Company, trustee. They claim:

1. That he entered into a contract, on behalf of appellant and his wife, to sell the land to Sengstacken and Smith, on May 17, 1905, and that his agency ceased at that time.

2. And they further contend that all the other members of the purchasing syndicate are innocent purchasers, etc.

I.

In the first place, as stated in our former brief, appellees have not proved that Hall contracted to sell the land to Sengstacken and Smith, on May 17, 1905, as alleged by them.

Appellees say in their brief (p. 43)

> "that defendant Hall as agent for appellant and his wife, on May 17th, 1905, sold the prop-

erty involved to defendants Sengstacken and Smith; that at the time Sengstacken and Smith gave him their joint note for one hundred dollars as part payment on the purchase price, which note is introduced in evidence as 'Defendant's Exhibit BB,' and that Hall then gave Sengstacken and Smith a receipt for said one hundred dollars, specifying the terms of the sale and describing the property. The passing of this receipt and the note was a sufficient memorandum to satisfy the statute of frauds of the state of Oregon, which said statute incorrectly set out on page 59 of appellant's brief. * * * The note shows definitely who the contracting parties are, being payable to John F. Hall, and being signed by Henry Sengstacken and L. D. Smith. The receipt, as testified to by Mr. Sengstacken, contained the 'terms' and described the property. Mr. Sengstacken states the terms were $4400.00, one-half cash and one-half in one year (T., p. 307). Then (T., p. 308) he further testifies 'That we paid him the note. My recollection is that we took a receipt for $100.00 on account, describing the land and the terms.' Defendant Hall testifies (T., p. 231):

"Q. Was there any written memorandum made at the time signed by yourself in the nature of a contract or receipt or otherwise, with reference to this transaction?

"A. I made out a receipt for $100.00 on the purchase price of this particular tract of land."

The unsoundness of appellees' argument must be apparent at a glance.

In the first place, the record shows that the promissory note referred to was not payable to "John F. Hall," as asserted by appellees, but to the firm of "Hall & Hall"—and to no one else. (T., p. 437.) The names of Dora or Christian Herrmann are not mentioned or referred to in any way therein. Sengstacken testified that he himself wrote the words, "Paid by purchase of land. Mrs. Dora Herrmann," across the face of it after he claims to have received it back from Hall. (T., p. 308.) And he also testified that he cut the names of the makers off some time before the date of trial. (T., p. 308.)

And the fact that Sengstacken testified that the receipt "described the property" does not, of course, show what the description set forth in the instrument was, or that it described the land involved in this case.

Also, the fact that Hall testified that he "made out a receipt for $100.00 on the purchase price of this particular tract of land" does not show what the contents of the receipt were. And what does he mean by "this particular tract of land?" Can the court determine from that what the description contained in the instrument was?

Taking appellees' statements at their face value, however—assume that "the note shows definitely who the contracting parties are;" that the receipt shows that "the terms are $4400.00, one-half cash and one-half in one year;" and that it "described

the property''—still these facts do not constitute a binding and enforceable contract. It does not appear that the vendors bound themselves to sell and convey or that the vendees obligated themselves to purchase.

Again, it does not appear whether there were any conditions of any kind attached to the sale or not. For anything that appears to the contrary, the agreement might have been optional, one that either of the parties might have performed or refused to perform at will.

Also, it does not appear by the evidence whether the vendors were to convey the fee simple title of the land, or a life estate, or an estate for years, or what. It does not appear whether a deed was to be executed and delivered or not. But assuming that a deed was to be given, it does not appear what kind of a deed—whether a warranty, a bargain and sale, or a mere quitclaim. It does not appear whether the deed was to contain any conditions or covenants of any kind. And it does not appear when the title was to pass—whether upon payment of the first installment of the purchase price, or the last, or when, or at all. Etc.

It must be very apparent, therefore, that appellees have utterly failed to prove their claim, that Hall entered into a valid, binding and enforceable contract, on behalf of appellant and wife, to sell the property in question to Sengstacken and Smith, on May 17, 1905. And their further contention, that Hall's agency terminated at that time, by reason of

that fact, is, therefore, without foundation or merit.

In the case of Moore vs. Petty, 135 Fed. 668 (C. C. A., 8th Circuit), the same defense was made as asserted by appellees in the case at bar. In that case, the defendants claimed that they had contracted to sell the property in question to a man by the name of Gray, and that Gray subsequently conveyed his interests to them. The defendants contended that their agency terminated at the time they contracted to sell the land to Gray, and that their subsequent purchase from him was, therefore, valid. Defendants failed to prove, however, that they had entered into a valid, binding and enforceable contract, on behalf of their principals, the plaintiffs, to sell the property to Gray, before they took Gray's place in the purchase. And the court, among other things, said (p. 675):

> *"It was shown conclusively that the relation of principal and agent between the plaintiffs and the defendants did not cease with the preparation and signing of the contract of sale with Gray. The defendants had expressly agreed that, for the compensation which they were to receive, they would look after the interests of the plaintiffs until the business was concluded and the money fully paid. Moreover,* the contract of sale which was signed by them as agents of the plaintiffs contained an unauthorized provision binding the latter to the execution of a warranty deed to Gray. In that condition *it was not enforceable against the plaintiffs, nor did Gray at any time before the defendants took*

his place in the transaction so obligate himself that the plaintiffs could have held him to the purchase. The latter proceeded with the important condition respecting the character of the deed left unsettled and undetermined by any obligatory writing signed by Gray, down to the time the notes, mortgage and cash payment were sent to plaintiffs, and possibly to the time when, two months later, they struck from the proposed deed the clause of warranty, and executed and returned it to the defendants. But before either of these things were done, Gray, the grantee in the deed, had ceased to have or claim any interest whatever in the property. Before the notes and mortgage were sent to plaintiffs, and before the payment of the purchase price was made, *and whilst the trust relation between the plaintiffs and defendants existed,* Gray came to the latter, and expressed regret at having made the purchase, and a desire to withdraw therefrom. This was an important fact materially affecting the interests of the plaintiffs, and of which they were entitled to be fully and fairly advised by their agents. Whatever of benefit under the circumstances might accrue from the willingness of Gray to abandon the purchase ought not to have been secretly reserved by the agents for their own advantage. They were bound to the utmost good faith, and to the subordination of their own interests to those of their principals. Facts then within the knowledge of the defendants evidenced at least a probability that a higher price could be secured for the land

than Gray was to pay, and the defendants did pay as his successors. *It would not do to draw lines too nicely to aid agents who have, during the existence of their relation of trust and confidence, assumed a position with reference to the business in their charge which is antagonistic to their principals.* What we have said concerning the state of the negotiations when the defendants took the place of Gray in the purchase indicates a clear distinction between the case at bar and that of Robertson vs. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592, upon which reliance is placed."

Appellees further say (brief, p. 44) that

"this evidence of the receipt, both on the part of Sengstacken and Hall, was not objected to at the time of the trial nor was there any motion thereafter interposed to strike the same out, and now, for the first time, on appeal an objection is made that this is incompetent and insufficient to establish the contents of said receipt."

Appellant not only contends that appellees have not proved the contents of the alleged receipt by "competent" evidence, but he contends that they have not proved it by *any* evidence, competent or otherwise.

And furthermore, appellees' statement, that no objection was made to the introduction of "this evidence of the receipt, both on the part of Sengstacken

and Hall," at the time of the trial in the court below is untrue.

The record shows that Hall was first called by appellees, that he testified as follows, and that the following objections were made to his testimony, to-wit (T., p. 229 et seq.):

Q. When were the final negotiations instituted resulting in this transfer?

A. It was in May, 1905.

Q. For the purpose of refreshing your memory as to dates, I hand you a promissory note taken from the possession of Henry Sengstacken, dated Marshfield, May 17, 1905, for $100, payable to the order of Hall & Hall, and ask you to examine that and then state, if you can when the first negotiations were made resulting in the sale of this property.

A. Well, the negotiations probably a few days before this letter—before this note was made, but on this date we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith.

Mr. St. Rayner: *Wait a minute; excuse me, I would like to know if there was any written agreement.*

Court: *Ask him that.*

Mr. St. Rayner: *I object to any oral testi-*

mony being given of the nature of the sale of this property.

Court: *He is not proving title, he is proving when negotiations began. This doesn't prove title, of course.*

Q. Do you recognize this note?

A. I recognize this note except this handwriting there; that wasn't made that day, but the note itself, I recognize the note as being—

Court: What date is that?

A. May 17th, 1905.

Q. That is, the handwriting across the face, "Paid by purchase of land, Mrs. Dora Herrmann." You don't recognize that?

A. No, I don't recognize that, no.

Q. Well, where did you ever see that note before?

A. That note was given to me by Mr. Smith and Mr. Sengstacken on May 17th, 1905.

Q. For what purpose?

A. On the purchase price of the Herrmann claim—Holcomb claim.

Q. At what price?

A. $4400.

Q. Was this note signed and by whom?

A. Henry Sengstacken and L. D. Smith.

Mr. Peck: We offer the same in evidence.

Mr. St. Rayner: We object on the ground that it is incompetent.

Court: The objection will be overruled and it will be put in the record.

Note marked "Defendant's Exhibit BB." (Which is hereto attached and made a part hereof.)

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I made out a receipt for $100 on the purchase price of this particular tract of land.

Q. Where is that receipt?

A. I gave it to Mr. Sengstacken; I haven't seen it since.

Q. Did he surrender it to you when the transaction was finally consummated?

A. He did not.

Q. Have you made a search for that paper?

A. I looked over my office and haven't got it there, and I don't have any recollection of his ever returning it to me; I don't think he did. In fact I am positive it wasn't returned.

Q. *Were there any conditions attached to this sale of any nature?*

Mr. St. Rayner: *I object to any testimony of an oral nature.*

Court: I haven't seen the bill of complaint in this case, but I understand you are charging actual fraud; you are charging that this land was purchased by these people by actual fraud.

Mr. St. Rayner: We charge that they pretended to purchase the land the 30th of August, 1905.

Court: This you charge was a fraudulent transaction?

Mr. St. Rayner: We also charge it as a fraudulent transaction, between a fiduciary agent —between a principal and agent. The agent reserving at the time of sale—

Court: You base your right to recover in this case solely on the fact that Hall was the agent of Mrs. Herrmann?

Mr. St. Rayner: No, that is only one of the grounds.

Court: The other ground is the actual fraud?

Mr. St. Rayner: The other ground is the actual fraud.

Court: Very well, then it is quite important

that we should know all the facts, and this evidence is perfectly competent if *that* is the charge.

Mr. St. Rayner: *What we object to in this, however, is for the defendant attempting to prove by oral testimony that there was an oral agreement between Mr. Hall, as the attorney in fact of Mr. and Mrs. Herrmann, and Mr. Sengstaken and Mr. Smith, in selling this property. It is in contravention of the statute.*

Court: *Certainly it probably would not amount to a legal contract, but as a fact in this case, as it bears on the question of fraud, and for that purpose it is competent.*

Mr. Peck: *I will withdraw the question.*

And Sengstacken testified as follows (T., p. 307 et seq.):

Q. Now, relate in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman tract to yourself and associates.

A. * * * I met Ren Smith in town one day. * * * So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on time. He said he would take $4400, so we agreed to take it on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for $100, as part payment of the land.

Q. Is Defendant's Exhibit BB that note?

A. Yes, sir, that is the note.

Q. Did you make out that note?

A. I made that note out.

Q. And did you put the endorsement across the face here, "Paid by purchase of land. Mrs. Dora Herrmann"?

A. I did that when it was redeemed, yes.

Q. On August 30, 1905, did you make that endorsement?

A. Yes, when I got the note back. I don't know the exact date.

Q. Did you cut the signature off that date.

A. I did. That is the way I generally cancel my notes; cut the name off.

Q. Whose names were signed to that note before you cut them off?

A. Henry Sengstacken and L. D. Smith.

Q. *Now proceed with your testimony.*

A. *When we paid him the note, my recollection is that we took a receipt for $100 on account, describing the land and the terms,* * * *

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. I have been looking for it, but I have been unable to find it. * * * It is possible it may have been destroyed, and it is possible I may have it yet among my papers. At any rate I haven't been able to locate it.

Q. Have you made a careful search for it?

A. I made quite a search.

Thus it appears that there is not a word in the testimony of either Hall or Sengstacken showing the contents of the alleged memorandum-receipt.

The record shows that there were only two instances where Hall even attempted to state the contents of the missing contract. And appellant objected both times.

First, counsel for appellees asked him when negotiations were instituted resulting in the sale of the property. (T., p. 229.) In reply to that question, the witness stated when negotions were commenced, and then volunteered the following: "but on this date (May 17, 1905) we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith." (T., p. 229-30.) Counsel for appellant objected. (T., p. 230.) And the court held: "He is not proving title, but he is proving *when negotiations began. This doesn't prove title, of course.*" (T., p. 230.) The witness was then permitted to proceed with his testimony concerning the preliminary negotiations:

The second instance in which counsel for ap-

pellees attempted to prove the contract by this witness' testimony occurred when he asked him the following question: "Q. Were there any conditions attached to this sale of any nature?" (T., p. 231-2.) Counsel for appellant objected. (T., p. 232-3.) And the court held that this evidence *"certainly would not amount to a legal contract,"* but as a fact in the case, as it bears on the question of *fraud,* and for *that* purpose, it is competent." (T., p. 233.) And after the court ruled that oral testimony was not admissible for the purpose of proving the contract, but that it might be received for what it was worth for the purpose of refuting the charge of fraud in the bill of complaint, counsel for appellees withdrew the question (T., p. 233), and did not further interrogate the witness on the subject.

And Sengstacken's testimony is practically a repetition of Hall's. After rehearsing Hall's story regarding the preliminary negotiations they claimed to have had for the sale and purchase of the land, he then testified (T., p. 308): "Q. Now proceed with your testimony. A. When we paid him the note, my recollection is that we took a receipt for $100 on account, describing the land and the terms." And after having thus testified that Hall gave him a receipt setting forth the terms of their alleged agreement, the witness, instead of stating the language of the receipt or the substance of its provisions, branched off into a discussion of other matters, and did not even attempt to give the contents of the instrument. There was, therefore, no occasion or necessity for appellant to object to his testimony on that point.

And the record further shows that, although the trial court ruled that Hall's testimony was not admissible for the purpose of proving the alleged contract, and although no further evidence was offered by appellees showing the contents of the alleged memorandum, yet, nevertheless, the court, in its opinion, held (T., p. 85) that, "Here the sale was *virtually* made by Hall to Sengstacken and Smith in May, 1905. At that time it is admitted that he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time of the contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard."

We submit that the trial court having expressly ruled that Hall's testimony was admissible merely for the purpose of showing "when negotiations began" and to refute the charge of "fraud," and that it was not admissible for the purpose of proving the "contract," that appellant was entitled to rely upon its effect being similarly limited, both in the court below and on appeal. It is manifest that any other rule would lead to surprise and injustice.

Barasch vs. Kramer, 115 N. Y. Supp. 176.

Schmit vs. Scweitzer, 137 N. Y. Supp. 807, 808.

Henry vs. Everts, 29 Cal. 610, 612.

And the rule is elementary that where objection is once made to the introduction of evidence, and

the court passes upon the objection, that it is not necessary to repeat the same objection to the same class of evidence.

Salt Lake City vs. Smith, 104 Fed, 457, 470.

And this is so even though another witness attempts to testify regarding the same matter.

Cin. etc. Ry. vs. Bennett, 134 Ky. 19.

Schierbaum vs. Schamme, 157 Mo. 1.

Louisville etc. Ry. vs. Garver, 85 Tenn. 465.

Appellees further say (brief, p. 48) that

> "Appellant should not in this suit be permitted to raise the question whether the contract was a verbal or a written one; the defense of the statute of frauds is never available in a collateral proceeding," etc.

The question of the contract is not collaterally involved in this case; it is directly in issue. Appellees themselves expressly pleaded it as an affirmative defense in their answer (par. XXVII, 1, T., p. 65) and it was denied in the reply (par. XXIII, T., p. 79). Indeed, it is the very foundation of appellees' defense herein. They themselves tendered it as an issue in the case, for the purpose of showing that Hall's agency terminated on May 17, 1905, before he acquired an interest in the land he was authorized to sell; and they are, therefore, bound to prove a valid, binding contract under the law. Otherwise, their defense must fall.

And appellees further say (brief, p. 53), that:

> "From every viewpoint we are squarely within the Robertson vs. Chapman case and entitled to the application of the law in that case."

The Robertson vs. Chapman case and the case at bar are in no way similar.

In that case it was not held, or even contended, as contended by the appellees herein, that an agent could purchase the property entrusted to him for sale after he had entered into a mere agreement to sell it and before the contract had been executed. The complainant, Robertson, charged that his agent, "Polk bought in the name of O'Donohoe." The court, however, found that this charge was unsupported by the evidence.

And the agency under which Polk was acting in that case was not the same as Hall's agency in the case at bar. Polk was not employed and authorized to sell and convey the property involved in that case, under a general power of attorney, giving him power to fix the terms of sale, execute deeds, notes, mortgages, etc., as was Hall in this case. Polk was merely directed by Robertson to accept an offer, on his behalf, that had been made by O'Donohoe to purchase the land, and to deliver the title papers, which the parties themselves executed. And the evidence shows that Polk fully performed all the acts he was authorized by Robertson to perform in effecting the sale before he acquired any interest in the property. He accepted O'Donohoe's offer for Robertson, and delivered O'Donohoe's notes and mortgage on the

land for the deferred payments of the purchase price to Robertson. Robertson accepted O'Donohoe's notes and mortgages, and executed a deed of the premises, and sent it to Polk, with instructions to deliver it to O'Donohoe, whenever the latter paid the $1000.00 cash due on the purchase price. Some time thereafter Polk bought the property from O'Donohoe. And two years later Robertson instituted suit to recover the same, charging that "the original purchase in the name of O'Donohoe was a mere device upon the part of Polk, in violation of his duty as the plaintiff's attorney and agent, to get the property at less than its value, concealing from the plaintiff, all the while before the conveyance to O'Donohoe, the fact that he, Polk, bought in the name of O'Donohoe." The court found, however, that the evidence did not support the charge made in the bill of complaint, but that the sale by Robertson to O'Donohoe, through the agency of Polk, was in every sense a bona fide sale to O'Donohoe, and that Polk was not interested therein; that the sale to O'Donohoe had been executed before Polk agreed to purchase the property from the latter; and that at the time Polk acquired the land from O'Donohoe, the agency under which Polk was acting had terminated. The court said:

> "The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed

a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained (the court states previously in its opinion that it was decided that the trustee, Robertson, had authority under the will to convey the property, and that a decree of the court authorizing him to sell was, therefore, unnecessary, p. 677), and upon the payment of the $1000.00 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. * * * A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee * * * his (Robertson's) present complaint * * * is that Polk, his agent to sell, while pretending to have sold to O'Donohoe, had, without his knowledge or assent, taken the property for himself, in the name of O'Donohoe, and that he did not become aware of that fact until August, 1888. If this complaint were well founded, the plaintiff, according to the principles to which we have referred to, and which are deeply rooted in the law, would be entitled to a decree that would deprive Polk of

the fruits of his infidelity. But, as already suggested, the evidence does not justify the conclusion that O'Donohoe's purchase was, in fact, for the benefit of Polk."

Thus is appears that Polk purchased from O'Donohoe after the agency under which he was acting had terminated, and after the title of the property had passed from Robertson to O'Donohoe.

Appellees herein assert that "the legal title had not passed to O'Donohoe, the deed therefor was in the hands of the agent awaiting the completion of payments by O'Donohoe" at the time Polk acquired the property from O'Donohoe.

As a matter of fact, it does not appear when Polk delivered Robertson's deed to O'Donohoe. The fact of the delivery of the deed in that case, however, was of minor importance. O'Donohoe and his wife executed and delivered their notes and mortgage on the land and delivered the same to Robertson, and he received and accepted them, long before Polk traded O'Donohoe out of the property. By accepting O'Donohoe's mortgage on the property Robertson thereby expressly acknowledged that the title had passed to and vested in Donohoe. See:

Balfour vs. Hopkins, 93 Fed. (9th Circuit) 569.
Willison vs. Watkins, 3 Pet. (U. S.) 48.
Kelly vs. Stanberry, 13 Ohio 408.
Conklin vs. Smith, 7 Ind. 108.
Voss vs. Ella, 106 Ind. 260.

The facts in the case at bar, however, are very different from the facts in the Robertson vs. Chapman case.

In this case, Hall was not authorized merely to accept an offer for the purchase of the land in question for appellant and his wife, but he was employed and empowered to both sell and convey the same, under a general power of attorney (T., p. 31-33), giving him authority to enter into agreements, fix the terms of sale and

> "to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, * * * bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages, * * * and other instruments in writing of whatever kind and nature."

And the record herein shows beyond any dispute that *before* Hall executed and delivered the deed conveying the land in question to the Title Guarantee & Abstract Company, trustee, on August 31, 1905, and *before* that company executed and delivered its note and mortgage to him for the deferred payments of the purchase price, that he (Hall) had an understanding with Sengstacken, whereby it was agreed that he was to have a share in the purchasing syndicate and a joint undivided interest in the land. Henry Sengstacken himself admitted these facts to be true on his cross-examination before the trial court. He testified (T., p. 332):

> Q. Well, *after* you had agreed with him (Hall), or he had agreed with his brother, and

announced to you that he and his brother would take the one-twelfth, *then you closed the transaction, and executed the deed and mortgage.* Is that true?

A. *Yes, I guess that is correct.*

And Hall did not purchase from his principals' grantees; he purchased *with* them; he acquired his interest at the same time they acquired theirs, in the same transaction, and under and by virtue of the same deed of conveyance, and he himself paid part of the purchase price to his principals. "A real bona fide sale of the property" did not "intervene" between the time Hall accepted the position of agent and the time he purchased an interest in the land; the title passed directly from Mr. and Mrs. Herrmann to the Title Guarantee & Abstract Company, in trust for Hall and his associates.

The best proof that Hall's agency had not terminated before he had the understanding with Sengstacken, whereby it was agreed that he was to have a share of the property, is the fact that he performed other acts on behalf of appellant and his wife in effecting the sale *after* that time. If his agency had terminated at the time contended by appellees, then what right had Hall to thereafter execute and deliver a deed of the premises to the Title Guarantee & Abstract Company, in the names of his principals? What right had he thereafter to embody in the deed all of the mineral rights, coal beds, water-front, tide-lands and the other valuable easements and rights-of-way to the navigable waters

of Isthmus Slough running into Coos Bay over Lot 3—an entierly different tract to the "Holcomb" tract—which require nearly four pages of the printed Transcript herein to describe (T., p. 34-37)? What right had he thereafter to convey all of the rights in the deed under general covenants of warranty and seisin and against encumbrances in the names of his principals? What right had he thereafter to accept the purchase price of the land and the note and mortgage of the Title Guarantee & Abstract Company, trustee, for the deferred payments, in the names of his principals? If Hall's agency terminated when appellees claim that it did, then we submit that his subsequent conveyance to the Title Guarantee & Abstract Company, trustee, was void, for the reason that he was without power or authority to make the same.

No court has ever held, where an agent has been authorized to both sell and convey the property of his principals, as Hall was in this case, that such an agency would terminate before the agent had actually sold and conveyed the property. To say that an agency has terminated before the agent has performed the acts he has been employed to perform would be absurd. In Wing & Evans vs. Hartupee, 122 Fed. 897, a case which even appellees were forced to concede is directly in point herein, the court holds in unmistakeable terms that such an agency does not terminate, and that such an agent cannot speculate with the subject-matter of his agency, until after the property has been sold and conveyed and the legal title thereof has passed from his principal. The court said (p. 902):

"It is a working rule that is needed—one that is convenient and safe to apply—and, after much consideration, we think the test that has been indicated, namely, whether the legal title has or has not passed, should determine what action a court of equity must take when it appears that a trustee has re-purchased an interest in the trust estate from the person to whom the interest has been sold. *If the legal title has not yet left the trustee, the contract between the parties having dealt with the equitable title only, the transaction is voidable at the option of the cestui que trust,* without inquiry into its good path."

A relaxation of the rule thus stated would open wide the door for the perpetration of all the evils which the rule was intended to prevent.

Appellees further say (brief, p. 56) that

"The appellant contends that the sale should be set aside as to all the original purchasers on the theory that they were co-purchasers with Hall and that his constructive fraud tainted the whole transaction.

"For the purpose of argument we will admit that if Hall agreed from the beginning of the negotiations to take a joint interest with the other purchasers and they had knowledge of the fact, then and in that event, the sale could be set aside in its entirety. That is the rule of law laid down in the cases cited by appellant

and is a most salutary principle."

> "But the facts in this case differ from the facts of every other case cited by appellant. These defendants were not co-purchasers from the beginning of negotiations, nor were they joint purchasers at any stage of the transaction."

It is immaterial whether Hall "agreed from the beginning of negotiations" to take his interest with the other purchasers. He agreed to take his interest before he sold and conveyed the land. The sale, therefore, should be set aside.

Keith vs. Kellams, 35 Fed. 243, 247.

And appellees' assertion, that "these defendants were not co-purchasers * * * nor were they joint purchasers at any stage of the transaction," is, to say the least, highly absurd. Appellees show by their own evidence that "these defendants" bought the land as a whole, that they purchased it together, that their interests were undivided, that they acquired their interests at the same time, in the same transaction, and under and in virtue of the same deed of conveyance. How then can counsel for appellees seriously assert that they were not co-purchasers?

And an examination of appellees' brief shows that they have not even attempted to meet or answer appellant's contention, that all of the members of the purchasing syndicate were impressed with constructive notice of Hall's purchase, etc. (See ap-

pellant's original brief, pages 108 et seq.)

Appellees further say (brief, p. 62) that

> "There was no reason why said defendants should suspect that Hall was not reporting the facts of his purchase to his principal, and if anyone should suffer, it should not be the innocent parties."

Where an agent has violated his trust, as Hall did in this case, the presumption is not that he has communicated the fact to his principals, but the presumption is to the contrary.

> Mechem on Agency, Sec. 723.
> I. Clark & Skyles on Agency, Sec. 485.

Appellees assert that, although the court should find that Hall purchased his interest before his agency terminated, the appellant cannot recover the land, because all of the appellees, except Hall, are bona fide purchasers.

If Hall violated his trust, how can Sengstacken and Smith be innocent purchasers, when, as defendants allege and show themselves, that they negotiated the transaction and entered into the agreement with him under which he procured his interest with them?

Appellees have not attempted to meet or answer the points and authorities set forth in appellants' original brief, showing that all of the parties to the transaction are impressed with constructive or presumptive notice of Hall's acquistion of his interest

in the land. (Appellants' brief, p. 108 *et seq.*)

Appellees must concede, under the authorities cited, that if Hall conveyed the property in violation of his trust, that his principal may follow it into the hands of anyone who is not an innocent purchaser.

Oliver vs. Pratt, 3 How. (U. S.) 401.

The claim of being a bona fide purchaser is available only when alleged as an affirmative defense by plea or answer.

Boone vs. Chiles, 10 Pet. 177.

Appellees have not, in their answer, alleged any facts to support the defense or plea that they are innocent purchasers. On the contrary, they expressly alleged, and the evidence shows, that they paid only one-half of the stipulated purchase price, and gave a mortgage back to secure the other half. (Answer, T., p. 62-63.) And the appellees all admitted in their testimony that they had actual notice shortly after the delivery of the deed that Hall had acquired his interest in the land with them. And it is also admitted that the mortgage was not paid at the time they were notified of that fact.

The rule is well settled that to constitute a bona fide purchaser all of the purchase money must have been paid before notice of the equitis or rights of the owner. It is not sufficient to show that part was paid and part secured by a mortgage on the land.

Balfour vs. Hopkins, 93 Fed. 570.
Villa vs. Rodriquez, 12 Wall. 338.
Wormley vs. Wormley, 8 Wheat. 421.
Wood vs. Rayburn, 18 Or. 4, 20.
Lewis vs. Phillips, 17 Ind. 108, 113.
Dugan vs. Vattier, 3 Balckf. 245.

Appellees also assert that, although the court should hold that Hall purchased his interest before his agency terminated, that the interests purchased by Clinkinbeard, Rogers and Rood, which Sengstacken and Smith afterwards purchased from them, cannot be set aside, on the ground that these parties were innocent purchasers. Counsel for appellees assert this on the ground that where the owner has been illegally deprived of his property, if it reaches the hands of an innocent purchaser, although it may be conveyed by him afterwards to a party with notice of the illegal transaction, that the rights of the owner are cut off. We concede that is the general rule in cases where it is applicable. But the exception to the rule stated applies here. Sengstacken and Smith have purchased and now claim to own these interests, and they are the original parties who negotiated the deal and induced Hall to violate his trust. The rule in such cases is well settled that when the title passes to an innocent purchaser, if it afterwards revests in the original party to the illegal transaction, all the equitable rights of the owner reattach to it in his hands. See cases in appellant's original brief, page 114.

It is therefore apparent that none of the appellees are innocent purchasers of this property in any aspect of the case.

Respectfully submitted,

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